

1 Andrew I. Silfen (*pro hac vice*)  
2 Beth M. Brownstein (*pro hac vice*)  
3 **ARENT FOX LLP**  
4 1301 Avenue of the Americas, 42nd Floor  
5 New York, New York 10019  
6 Telephone: (212) 484-3900  
7 Facsimile: (212) 484-3990  
8 Email: andrew.silfen@arentfox.com  
9 beth.brownstein@arentfox.com

6 Aram Ordubegian (SBN 185142)  
7 **ARENT FOX LLP**  
8 55 Second Street, 21st Floor  
9 San Francisco, CA 94105  
10 Telephone: (415) 757-5500  
11 Facsimile: (415) 757-5501  
12 Email: aram.ordubegian@arentfox.com

10 *Counsel for BOKF, NA, solely in its capacity as*  
11 *Indenture Trustee for the Utility Senior Notes*

11 Dennis F. Dunne (*admitted pro hac vice*)  
12 Samuel A. Khalil (*admitted pro hac vice*)  
13 **MILBANK LLP**  
14 55 Hudson Yards  
15 New York, New York 10001-2163  
16 Telephone: (212) 530-5000  
17 Facsimile: (212) 530-5219

15 *and*

16 Gregory A. Bray (SBN 115367)  
17 Thomas R. Kreller (SBN 161922)  
18 **MILBANK LLP**  
19 209 Century Park East, 33rd Floor  
20 Los Angeles, CA 90067  
21 Telephone: (424) 386-4000  
22 Facsimile: (213) 629-5063

21 *Counsel for the Official Committee*  
22 *of Unsecured Creditors*

Michael S. Stamer (*admitted pro hac vice*)  
Ira S. Dizengoff (*admitted pro hac vice*)  
David H. Botter (*admitted pro hac vice*)  
Abid Qureshi (*admitted pro hac vice*)  
**AKIN GUMP STRAUSS HAUER & FELD LLP**  
One Bryant Park  
New York, New York 10036  
Telephone: (212) 872-1000  
Facsimile: (212) 872-1002

*and*

Ashley Vinson Crawford (SBN 257246)  
**AKIN GUMP STRAUSS HAUER & FELD LLP**  
580 California Street  
Suite 1500  
San Francisco, CA 94104  
Telephone: (415) 765-9500  
Facsimile: (415) 765-9501

*Counsel for the Ad Hoc Committee of Senior*  
*Unsecured Noteholders of Pacific Gas and*  
*Electric Company*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

In re:

**PG&E CORPORATION,**

**- and -**

**PACIFIC GAS AND ELECTRIC  
COMPANY,**

**Debtors.**

☐ Affects PG&E Corporation  
☐ Affects Pacific Gas and Electric  
Company

☒ Affects both Debtors

*\* All papers shall be filed in the Lead  
Case, No. 19-30088 (DM).*

Case No. 19-30088 (DM)

Chapter 11

(Lead Case)

(Jointly Administered)

**CONSOLIDATED OPPOSITION BRIEF  
OF CERTAIN CREDITOR GROUPS AND  
REPRESENTATIVES REGARDING THE  
ENTITLEMENT OF HOLDERS OF  
UTILITY FUNDED DEBT CLAIMS TO  
OPTIONAL EARLY REDEMPTION,  
MAKE-WHOLE, OR SIMILAR AMOUNTS  
IN A SOLVENT DEBTOR CASE**

**Hearing**

Date: January 14, 2020

Time: 10:00 a.m. (Pacific Time)

Place: United States Bankruptcy Court  
Courtroom 17

450 Golden Gate Ave, 16<sup>th</sup> Floor  
San Francisco, CA 94102

## TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	3
I. The Optional Redemption Premiums Are Enforceable By Their Plain Terms.....	3
A. The Vast Majority of Senior Notes Tether the Utility's Obligation to Pay Optional Redemption Premiums to Fixed Dates or Any Time Prior to Stated Maturity Regardless of Acceleration of "Maturity" by a Bankruptcy Filing. ....	4
B. The Acceleration Clause Does Not Nullify—But Rather Supports—the Noteholders' Right to Optional Redemption Premiums After Bankruptcy. ....	7
1. Both the Optional Redemption Provisions' Terms and Applicable Law Allow For Redemption Following Bankruptcy. ....	8
2. Section 9.02 and the Optional Redemption Provisions Function Independently.....	10
C. The Debtors' Redemption of the Senior Notes Is Optional. ....	12
II. The Optional Redemption Premiums Are Not Disallowed By The Bankruptcy Code. ....	13
A. Optional Redemption Premiums Are Not Unmatured Interest. ....	13
B. The Debtors' Solvency Underscores Their Obligation to Fulfill Contractual Commitments. ....	15
CONCLUSION .....	17

## TABLE OF AUTHORITIES

Page(s)

### Cases

<i>In re 360 Inns, Ltd.</i> , 76 B.R. 573 (Bankr. N.D. Tex. 1987).....	15
<i>In re 433 S. Beverly Drive</i> , 117 B.R. 563 (Bankr. C.D. Cal. 1990).....	9
<i>In re AMR Corp.</i> , 730 F.3d 88 (2d Cir. 2013).....	9, 12
<i>Balsam v. Tucows Inc.</i> , 627 F.3d 1158 (9th Cir. 2010).....	11
<i>Banga v. First USA, NA</i> , 29 F. Supp. 3d 1270 (N.D. Cal. 2014) .....	5
<i>In re Beverly Hills Bancorp.</i> , 752 F.2d 1334 (9th Cir. 1984).....	16
<i>Biancalana v. Fleming</i> , 53 Cal. Rptr. 2d 47 (Ct. App. 1996).....	9
<i>In re Chemtura Corp.</i> , 439 B.R. 561 (Bankr S.D.N.Y 2010).....	12
<i>Chesapeake Energy Corp. v. Bank of N.Y. Mellon Tr. Co., N.A.</i> , 773 F.3d 110 (2d Cir. 2014).....	12
<i>Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner &amp; Smith Inc.</i> , 232 F.3d 153 (2d Cir. 2000).....	4
<i>In re Doctors Hosp. of Hyde Park, Inc.</i> , 508 B.R. 697 (Bankr. N.D. Ill. 2014).....	14
<i>In re Dow Corning</i> , 456 F.3d 668 (6th Cir. 2006).....	16
<i>In re Dow Corning</i> , 456 F.3d at 678–79.....	17
<i>In re Energy Future Holdings Corp.</i> , 540 B.R. 109 (Bankr. D. Del. 2015) .....	17

1	<i>In re Energy Future Holdings Corp.</i> ,	
2	842 F.3d 247 (3d Cir. 2016).....	<i>passim</i>
3	<i>In re Epicenter Partners, L.L.C.</i> ,	
4	No. 17-1216, 2018 WL 1354330 (B.A.P. 9th Cir. Mar. 15, 2018).....	16
5	<i>G3-Purves St., LLC v. Thomson Purves, LLC</i> ,	
6	953 N.Y.S.2d 109 (2012).....	14
7	<i>Gen. Elec. Capital Corp. v. Future Media Prods.</i> ,	
8	547 F.3d 956 (9th Cir. 2008).....	16
9	<i>Gencarelli v. UPS Capital Bus. Credit</i> ,	
10	501 F.3d 1 (1st Cir. 2007).....	16
11	<i>Golden Forest Props., Inc. v. Columbia Sav. &amp; Loan Assn.</i> ,	
12	248 Cal. Rptr. 316 (Ct. App. 1988).....	9
13	<i>HSBC Bank USA, Nat. Ass'n v. Calpine Corp.</i> ,	
14	No. 07 CIV 3088 GBD, 2010 WL 3835200 (S.D.N.Y. Sept. 15, 2010).....	14
15	<i>In re Imperial Coronado Partners, Ltd.</i> ,	
16	96 B.R. 997 (B.A.P. 9th Cir. 1989).....	9, 12, 13
17	<i>In Re LHD Realty Corp.</i> ,	
18	726 F.3d at 330.....	14
19	<i>Matter of MPM Silicones, L.L.C.</i> ,	
20	874 F.3d 787 (2d Cir. 2017).....	9, 10
21	<i>NML Capital v. Republic of Arg.</i> ,	
22	952 N.E.2d 482 (N.Y. Ct. App. 2011) .....	11, 12
23	<i>Olin Corp. v. Am. Home Assurance Co.</i> ,	
24	704 F.3d 89 (2d Cir. 2012).....	8
25	<i>In re Outdoor Sports Headquarters, Inc.</i> ,	
26	161 B.R. 414 (S.D. Ohio 1993).....	15
27	<i>Pac. Tr. Co. TTEE v. Fid. Fed. Sav. &amp; Loan Assn.</i> ,	
28	229 Cal. Rptr. 269 (Ct. App. 1986).....	9
	<i>Pacifica L 51 LLC v. New Invs., Inc. (In re New Invs., Inc.)</i> ,	
	840 F.3d 1137 (9th Cir. 2016).....	17
	<i>Perez-Encinas v. AmerUs Life Ins. Co.</i> ,	
	468 F. Supp. 2d 1127 (N.D. Cal. 2006) .....	4
	<i>In re Premier Entm't Biloxi LLC</i> ,	
	445 B.R. 582 (Bankr. S.D. Miss. 2010).....	12

1	<i>Provenz v. Miller,</i>	
2	102 F.3d 1478 (9th Cir. 1996).....	5
3	<i>In re Ridgewood Apartments of DeKalb Cty., Ltd.,</i>	
4	174 B.R. 712 (Bankr. S.D. Ohio 1994).....	14
5	<i>Ridgley v. Topa Thrift &amp; Loan Ass’n,</i>	
6	953 P.2d 484 .....	9
7	<i>In re Sidrian,</i>	
8	No. 08-42959 .....	16
9	<i>In re Solutia Inc.,</i>	
10	379 B.R. 473 (Bankr. S.D.N.Y. 2007).....	9
11	<i>Tan v. Cal. Fed. Sav. &amp; Loan Ass’n,</i>	
12	189 Cal. Rptr. 775 (Ct. App. 1983).....	9
13	<i>Thrifty Oil Co. v. Bank of Am. Nat’l Tr. and Savs. Ass’n,</i>	
14	322 F.3d 1039 (9th Cir. 2003).....	15
15	<i>In re Trico Marine Servs., Inc.,</i>	
16	450 B.R. 474 (Bankr. D. Del. 2011) .....	13
17	<i>Ultra Petroleum Corp. v. Ad Hoc Comm. of Unsecured Creditors of Ultra Res.,</i>	
18	<i>Inc. (In re Ultra Petroleum Corp.),</i>	
19	No. 17-20793, 2019 WL 6318074 (5th Cir. Nov. 26, 2019) .....	14, 16
20	<b>Statutes</b>	
21	11 U.S.C. § 502 .....	13, 15
22	11 U.S.C. § 1124 .....	13, 17
23	11 U.S.C. § 1129 .....	17
24	Cal. Civ. Code § 1639 .....	8
25	Cal. Civ. Code § 1641 .....	8

## SUMMARY OF ARGUMENT<sup>1</sup>

The Utility issued 29 series of Senior Notes totaling \$17.525 billion of debt—some issued in the wake of the devastating Wildfires that led to the Debtors’ chapter 11 filing. The Debtors are presumed solvent, and therefore able and expected to satisfy their debts and honor their prepetition contractual obligations. Despite their ability to pay the Senior Notes when due, the Debtors have decided to satisfy principal and interest on those Senior Notes early.

The issue is whether the refinancing of the Senior Notes for the express purposes of repaying those notes early is an optional redemption entitling the holders to an allowed claim for the Optional Redemption Premium. The short answer is yes.

The holders’ entitlement to the early Optional Redemption Premium stems from the plain language of the Note Documents. The Indentures governing 28 of the 29 series of Senior Notes require the Utility to pay Optional Redemption Premiums if the Utility decides to pay off the Senior Notes before either (a) fixed dates specified in the Note Documents (the Fixed Date Notes), or (b) “any time” before Stated Maturity (the Any Time Notes), in each case, irrespective of the acceleration of “maturity” as a result of filing chapter 11. The remaining Senior Notes require the payment of Optional Redemption Premiums if the notes are redeemed “prior to Maturity.” The Indentures’ Optional Redemption Provisions operate independently from their acceleration clauses. The acceleration clauses do not mention the Optional Redemption Provisions nor do they alter the timing fixed by such provisions or make them “inoperative” as the Debtors’ suggest.

The Utility has an option to either: (1) reinstate the Senior Notes and continue to pay principal and interest when due, or (2) pay principal and interest due on the Senior Notes, plus the Optional Redemption Premiums triggered by the Utility’s early satisfaction of the Senior Notes. Anything less is an impairment of the Noteholders’ properly allowed claims, entitling them to vote to accept or reject a plan.

---

<sup>1</sup> Capitalized terms not defined in this brief are defined in the Consolidated Opening Brief of Certain Creditor Groups & Representatives Regarding the Entitlement of Holders of Utility Funded Debt Claims to Optional Early Redemption, Make-Whole, or Similar Amounts In a Solvent Debtor Case [Docket No. 4092] (the “Creditors’ Br.”).

The Debtors’ Brief Regarding Utility Funded Debt Claims’ Entitlement to Make-Whole Premiums & Joinder of PG&E Shareholders [Docket No. 4896] is referred to herein as the “Debtor Br.”.

1 The Debtors suggest a different outcome: that the Senior Notes be satisfied early *without*  
2 paying the Optional Redemption Premiums *and* that, despite such obvious degradation of the  
3 Noteholders' legal entitlements, the Noteholders should not be afforded the right to vote on the  
4 Debtor Plan. This path, however, is not available to the Debtors.<sup>2</sup> Whether the Debtors owe the  
5 Optional Redemption Premiums is controlled by contract. And by their terms, the Optional  
6 Redemption Provisions require payment of an Optional Redemption Premium upon an early  
7 redemption of the Senior Notes. For 28 out of the 29 series of Senior Notes, the Utility must pay  
8 Optional Redemption Premiums if it satisfies the Senior Notes "at any time," or at any time prior  
9 to a Fixed Date.

10 The Debtors claim that payment of the Optional Redemption Premiums for *all* 29 series  
11 of Senior Notes is controlled by language found solely in the 2005 Indenture tying payment of  
12 the Optional Redemption Premium to "Maturity." But the language cited by the Debtors applies  
13 *only* to the 2034 Notes. It has no bearing whatsoever on the 28 other series of Any Time Notes  
14 and Fixed Date Notes. And in any event, the interpretation of the "Maturity" reference in the  
15 2034 Notes urged by the Debtors leads to an absurd result. That reference must be read in the  
16 context of the 2005 Indenture as a whole, which requires Optional Redemption Premiums to be  
17 paid if the Utility satisfies the 2034 Notes prior to *Stated Maturity*. The Debtors cannot cherry-  
18 pick the language they perceive to better support their argument while ignoring the actual  
19 language of the Note Documents that embodies the parties' intent.

20 Unable to surmount the plain language of the Optional Redemption Provisions, the  
21 Debtors invoke the Note Documents' acceleration provision, found in section 9.02 of the  
22 Indentures. The Debtors find significant the fact that section 9.02 requires "premiums, if any" to  
23 be paid immediately upon non-bankruptcy-induced Events of Default, but does not have the same  
24 language for a bankruptcy-induced acceleration. But that supposed "omission" does not evince  
25 the parties' agreement to override the Optional Redemption Provisions in bankruptcy. To the  
26

---

27 <sup>2</sup> The Debtors' decision to litigate with unsecured creditors and deprive them of their legal and contractual rights is  
28 fundamentally inconsistent with their repeatedly stated purpose of these cases—to address Wildfire liability and leave  
all other unsecured creditors unaffected to the point of challenging unsecured creditors' participation in the chapter 11  
plan process at all.



1 contrary, the omission of “premium, if any” from the bankruptcy acceleration provision is  
2 consistent with, and supports, the Noteholders’ entitlement to the premium under the  
3 circumstances here. The key to understanding the impact of the “premium, if any” language is  
4 the operation of the Bankruptcy Code. In bankruptcy (unlike after other Events of Default) the  
5 Debtors can choose to (a) redeem the Senior Notes, in which case Optional Redemption Premiums  
6 would be due, *or* (b) reinstate the Senior Notes and adhere to the notes’ contractual obligations  
7 going forward (with no premiums being due unless the Debtors redeem the reinstated notes early).  
8 Therefore, it would make no sense to make the premiums due immediately upon a bankruptcy  
9 filing since under the Bankruptcy Code, the Debtors may choose to reinstate the Senior Notes, in  
10 which case no premium would be due.

11 Nor is the Noteholders’ contractual right to Optional Redemption Premiums disallowed  
12 by the Bankruptcy Code. For starters, the vast majority of courts—including those in the Ninth  
13 Circuit—treat make-whole premiums as charges or liquidated damages, not disallowed claims for  
14 unmatured interest. The Debtors’ disingenuous conflation of the concepts of “unmatured interest”  
15 and “unmatured premium” is an attempt to side-step that precedent should not be countenanced  
16 by the Court.

17 But even assuming *arguendo* that the Optional Redemption Premiums were unmatured  
18 interest, the Debtors’ solvency commands payment of the contractual early redemption  
19 obligations. In solvent-debtor cases, courts are loath to allow debtors to use bankruptcy to evade  
20 their pre-petition contractual obligations. Rather, courts presumptively enforce the terms of the  
21 contracts. Creditors are not battling for a “slice of the pie” in such cases; solvent debtors (like the  
22 Debtors) are held to their obligations.<sup>3</sup>

## 23 **ARGUMENT**

### 24 **I. The Optional Redemption Premiums Are Enforceable By Their Plain Terms.**

25 The plain language of the Note Documents and applicable state law make clear that the  
26 Utility must pay Optional Redemption Premiums if it chooses to redeem the Senior Notes prior to  
27

---

28 <sup>3</sup> The Creditors’ Committee is a party to this brief solely with respect to Section II.B. and reserves all rights as set forth  
in the UCC Statement of the Creditors’ Brief.

1 the dates specified in the Note Documents—whether on a Fixed Date, at “any time,” or prior to  
2 Stated Maturity. *See* Creditors’ Br. at 15–25. The Debtors, however, argue that Optional  
3 Redemption Premiums are *unavailable* to the Noteholders under the Note Documents’ plain terms  
4 because the Note Documents’ acceleration clause (Indentures § 9.02) automatically accelerates the  
5 Senior Notes upon the Utility’s bankruptcy filing and renders the Optional Redemption Provisions  
6 moot. The Debtors are wrong, and overlook the plain language of the Optional Redemption  
7 Provisions, which require the Utility to pay the Optional Redemption Premiums if the Utility  
8 satisfies the Senior Notes prior to the dates specified in the Note Documents. This Court must  
9 “give effect to the intent of the parties as revealed by the language in their agreement.” *Compagnie*  
10 *Financiere de CIC et de L’Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 232  
11 F.3d 153, 157 (2d Cir. 2000); *see also, e.g., Perez-Encinas v. AmerUs Life Ins. Co.*, 468 F. Supp.  
12 2d 1127, 1133 (N.D. Cal. 2006) (same); Creditors’ Br. at 16 (collecting cases).

13           **A. The Vast Majority of Senior Notes Tether the Utility’s Obligation to Pay**  
14           **Optional Redemption Premiums to Fixed Dates or Any Time Prior to Stated**  
15           **Maturity Regardless of Acceleration of “Maturity” by a Bankruptcy Filing.**

16           The Note Documents require the payment of Optional Redemption Premiums if the Utility  
17 chooses to redeem the Senior Notes prior to the dates specified in the Note Documents, even after  
18 a bankruptcy-induced acceleration. *See* Creditors’ Br. at 15–20. As described in detail in the  
19 Creditors’ Brief, the Senior Notes are subject to one of three applicable Optional Redemption  
20 Provisions: (1) provisions relating to the **Fixed Date Notes**, under which Optional Redemption  
21 Premiums are due if the Utility chooses to redeem those notes “at any time prior to [the Fixed  
22 Date],” *e.g.*, 10th Supp. Indenture § 301; (2) provisions relating to the **Any Time Notes**, providing  
23 for Optional Redemption Premium payments if the Utility chooses to redeem those notes “at any  
24 time,” *e.g.* 1st Supp. Indenture § 301; and (3) provisions in the 2005 Indenture governing the **2034**  
25 **Notes**, which, read in context of the 2005 Indenture as a whole, require payment of an Optional  
26 Redemption Premium if the Senior Notes are redeemed at any time before Stated Maturity,  
27 Creditors’ Br. at 18–20. None of these provisions “make clear that Optional Redemption Premiums  
28 can *only occur prior to the Maturity of the Notes*,” as the Debtors contend. Debtors’ Br. at 9  
(emphasis added).

1       The Debtors claim that the Optional Redemption Provisions “uniformly address  
2       circumstance where the Notes are voluntarily paid off . . . before maturity . . . .” Debtors’ Br. at 6.  
3       But that characterization is specious. *Only* the 2005 Indenture, which governs *only* the 2034 Notes,  
4       ties payment of the Optional Redemption Premium for that single series of Senior Notes to  
5       “Maturity.” The vast majority of the Senior Notes (28 out of 29 series of the Senior Notes at issue)  
6       establish that the Optional Redemption Premiums are owed if the redemption occurs prior to a  
7       Fixed Date, *see* Creditors’ Br. at 17, or at “any time,” *see id.* at 17–18, regardless of any bankruptcy  
8       induced acceleration. The Debtors’ “Maturity” argument thus rests on a false premise for those  
9       other 28 series of Senior Notes. And there can be no question that satisfaction of those 28 series of  
10      Senior Notes under the Debtors’ Plan would occur prior to the applicable Fixed Dates or at “any  
11      time.”<sup>4</sup>

12       As for the final series of Senior Notes—the 2034 Notes—the reference to “Maturity” in the  
13      Optional Redemption Provision requires a different analysis, but ultimately leads to the same result.  
14      As explained in the Creditors’ Brief, the parties’ use of the word “Maturity,” in the context of the  
15      2005 Indenture as a whole, must be read to mean prior to “*Stated Maturity*” to avoid absurd results.  
16      Creditors’ Br. 18–20.

17       In their opening brief, the Debtors suggest that for the Any Time Notes, the “any time”  
18      language in the associated Optional Redemption Provisions is actually limited to “any time . . .  
19      prior to Maturity.” Debtors’ Br. at 6. This argument fails for at least four reasons. *First*, the  
20      Optional Redemption Provisions in the Any Time Notes require payment of the Optional  
21      Redemption Premiums if redemption is made at “any time”—full stop and without limitation. The  
22      reference to “prior to Maturity” in the Any Time Notes appears solely on the Form of Senior Note  
23      (the “Model Note”) attached as an exhibit to each Supp. 2005 Indenture. But the documents make

---

24  
25      <sup>4</sup> Because the Debtors failed to address the plain-language differences between the three categories of Optional  
26      Redemption Provisions at issue here, the Noteholders have been deprived of any opportunity to respond to any  
27      arguments that are specific to each category of Senior Notes. To the extent the Debtors raise such arguments in their  
28      response to the Creditors’ Brief, BOKF and the AHC should be permitted to file a sur-reply to counter the Debtors’  
latent position. *See, e.g., Banga v. First USA, NA*, 29 F. Supp. 3d 1270, 1276 (N.D. Cal. 2014) (“If a party raises a  
new argument or presents new evidence in a reply brief, a court may consider these matters only if the adverse party is  
given an opportunity to respond.” (citing *El Pollo Loco v. Hashim*, 316 F.3d 1032, 1040–41 (9th Cir. 2003)); *Provenz*  
*v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996)).

1 clear that the indentures control, as the redemption language in the Model Note expressly provides  
2 that redemption is “[s]ubject to the terms and conditions of the Indenture.”

3 *Second*, the Model Note itself defines “MATURITY DATE” as a fixed date in the future.  
4 *See, e.g.*, 1st Supp. Indenture, Ex. A at 1 (“MATURITY DATE: March 1, 2037”) (capitalization  
5 in original). Thus, the Any Time Notes Model Note actually supports that the Optional Redemption  
6 Premium is due if there is any redemption prior to the specified maturity dates.

7 *Third*, the Debtors’ arguments would lead to absurd results and render the Any Time Notes’  
8 Optional Redemption Provisions superfluous. *See, e.g.*, Cal. Civ. Code § 1641 (contract provisions  
9 cannot be interpreted in a way that renders other provisions superfluous); *Crosby v. HLC*  
10 *Properties, Ltd.*, 167 Cal. Rptr. 3d 354, 359–60 (Cal. App. 2014) (same). “Maturity” is defined in  
11 the 2005 Indenture<sup>5</sup> as “the date on which the principal of such Bond . . . becomes due and payable  
12 . . . whether at Stated Maturity, by declaration of acceleration, upon call for redemption or  
13 otherwise.” 2005 Indenture § 1.01. If there is a call for redemption, the “Redemption Date” then  
14 becomes the Maturity. 2005 Indenture §§ 1.01, 6.05. Accordingly, an early redemption could  
15 *never* occur prior to Maturity, but only prior to Stated Maturity. Any contrary interpretation would  
16 render the Optional Redemption Provisions meaningless and must be rejected under well-settled  
17 principles of contract construction.<sup>6</sup>

18 *Finally*, the Debtors’ incorrect interpretation of the Model Note language must be rejected  
19 because it would directly contradict the “any time” language in the Any Time Note Indentures’  
20 Optional Redemption Provision. These provisions are “repugnant” to one another under applicable  
21 California law. *See* Cal. Civ. Code § 1652 (“Repugnancy in a contract must be reconciled, if  
22 possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to  
23 the general intent and purpose of the whole contract.”); *see also Fernandez v. K-M Industries*  
24 *Holding Co., Inc.*, 646 F.Supp.2d 1150, 1160 (N.D. Cal. 2009) (“repugnant” terms are  
25 “contradictory or inconsistent terms”). Where the court is unable to harmonize the repugnant

26 \_\_\_\_\_  
27 <sup>5</sup> All of the Any Time Notes were issued under supplements to the 2005 Indenture. *See* Creditors Br. Ex. 1 Each  
28 supplement under which the Any Time Notes were issued adopts the definitions in the 2005 Indenture “unless  
context suggests otherwise.” *See, e.g.*, 1st Supp. Indenture, Art. I (“Definitions”).

<sup>6</sup> The Debtors’ arguments with respect to the 2034 Notes must also fail for the same reason. *See* Creditors’ Br. at 18–  
20.

1 provision, then “the first [clause in the agreement] shall be received and the latter [clause in the  
2 agreement] rejected[.]” *Hobson*, 221 P.2d at 764–65. The Optional Redemption Provisions, which  
3 are set forth in the indentures before the Model Notes, clearly require payment of the Optional  
4 Redemption Premiums if the Any Time Notes are redeemed “any time” prior to *Stated* Maturity.  
5 That language controls and, as set forth above, would be the only logical interpretation of the Note  
6 Documents.<sup>7</sup> Thus, the Debtors’ satisfaction of the Any Time Notes prior to their dates of *Stated*  
7 *Maturity*—as with the Fixed Date Notes and the 2034 Notes—constitutes a “redemption” under the  
8 applicable Note Documents.<sup>8</sup>

9 **B. The Acceleration Clause Does Not Nullify—But Rather Supports—the**  
10 **Noteholders’ Right to Optional Redemption Premiums After Bankruptcy.**

11 Ignoring the unequivocal language in the Optional Redemption Provisions, the Debtors  
12 promote a bright-line rule that Optional Redemption Premiums can never be due after a bankruptcy-  
13 induced acceleration. Debtors’ Br. at 7–10. The Debtors’ interpretation is wrong as a matter of  
14 law and is foreclosed by the terms of the vast majority of the Optional Redemption Provisions,  
15 which tether redemption not to “maturity,” but to fixed dates or “stated maturity.” Further, the  
16 acceleration provisions do not mention, and therefore operate independently from, the Optional  
17 Redemption Provisions. In fact, section 9.02 recognizes that, following a bankruptcy-induced  
18 acceleration, premiums may or may not become due depending on the Debtors’ choice to either (1)  
19 redeem the Senior Notes, or (2) reinstate them. If the Debtors reinstate the Senior Notes, no

---

20 <sup>7</sup> This proposed reconciliation is likewise consistent with the bargain embodied in the Optional Redemption Provisions  
21 and the general intent and purpose of the Note Documents. Make-whole provisions, in general, protect lenders’ rights  
22 to the stream of interest for which they bargained and help to level the interest-rate risk between issuers and noteholders.  
23 If not for make-wholes, noteholders would bear risk of their issuers refinancing the notes when interest rates lower,  
24 forcing the noteholders to acquire new notes at these now lower rates. *See, e.g., In re Premier Entm’t Biloxxi LLC*, 445  
25 B.R. 582, 641 (Bankr. S.D. Miss. 2010) (quoting Am. Bar Foundation Corp. Debt. Fin. Project, *Commentaries on*  
26 *Model Debenture Indenture Provisions* 475 (1971)). The Debtors’ ability to intentionally trigger “Maturity” and evade  
27 the bargain they struck with the Any Time Noteholders—who agreed to lend the Debtors \$2.7 billion in principal  
28 capital for approximately 30 years at fixed rates of interest—undermines the purpose of the Optional Redemption  
Provisions and the Note Documents as a whole.

<sup>8</sup> In the end, the fact that the Debtors—not the Noteholders—drafted the Indentures provides a further reason that the  
inconsistencies in the Model Note’s “prior to maturity” language must be interpreted against them. This further  
supports the Noteholders’ interpretation. *See* Cal. Civ. Code § 1654 (“In cases of uncertainty not removed by the  
preceding rules, the language of a contract should be interpreted most strongly against the party who caused the  
uncertainty to exist.”); *DPR Constr. v. Shire Reenerative Med., Inc.*, 204 F. Supp. 3d 1118, 1130 (S.D. Cal. 2016) (same).

1 premium becomes due. Thus, the Debtors' reliance on § 9.02 is misplaced.

2 **1. Both the Optional Redemption Provisions' Terms and Applicable Law**  
3 **Allow For Redemption Following Bankruptcy.**

4 As discussed above, the vast majority of the Optional Redemption Provisions expressly  
5 require payment of Optional Redemption Premiums should the Utility redeem the Senior Notes  
6 prior to the Fixed Dates or "any time," not prior to "Maturity." *See supra* § I.A. Whether  
7 bankruptcy advances the maturity date of those 28 series of Senior Notes therefore has no bearing  
8 on whether the Optional Redemption Premiums are due.

9 Moreover, even though the Optional Redemption Provision found in the 2005 Indenture,  
10 governing only the 2034 Notes, uses the word "Maturity," that term must be read in context to  
11 require payment prior to Stated Maturity to avoid absurdity. *See id.* The Note Documents also  
12 provide the procedures for the Senior Notes to be "redeemable before their Stated Maturity" (*see*  
13 *Indentures* § 6.01). A bankruptcy-induced acceleration leading to "Maturity" would not impact  
14 whether the 2034 Notes are redeemed prior to Stated Maturity. Thus, even assuming the definition  
15 of "redemption" the Debtors espouse is correct—*i.e.*, a "redemption" in the technical sense must  
16 occur before maturity—the plain language of the Note Documents still requires payment of the  
17 Optional Redemption Premiums under the circumstances here. The parties in this instance chose  
18 to define "redemption" in terms that do not change depending on Maturity. This Court must give  
19 meaning to the language and provisions the parties chose to include in the Note Documents (*see*,  
20 *e.g.*, *Olin Corp. v. Am. Home Assurance Co.*, 704 F.3d 89, 99 (2d Cir. 2012); Cal. Civ. Code §§  
21 1639, 1641), *not* to the language the Debtors' would now prefer to have used when negotiating the  
22 Note Documents.

23 In any event, redemption can, as a matter of law, occur after a bankruptcy-induced  
24 acceleration. *See* Creditors' Br. at 20–22. *In re Energy Future Holdings Corp.* ("EFH"), 842 F.3d  
25 247 (3d Cir. 2016), applying New York law, so held. *Id.* at 255 (citing *Treasurer of N.J. v. U.S.*  
26 *Dep't of Treasury*, 684 F.3d 382, 388 (3d Cir. 2012) (noting that regulations allow bondholders to  
27 "present . . . long-matured savings bond[s] for redemption"); *Fed. Nat. Mortg. Ass'n v. Miller*, 473  
28 N.Y.S.2d 743, 744 (N.Y. Sup. Ct. 1984)) (declaring that "debtor may redeem" mortgage by



1 “pay[ing] . . . accelerated debt”). *EFH* is also in accord with precedent from the Ninth Circuit  
2 BAP, *In re Imperial Coronado Partners, Ltd.*, 96 B.R. 997 (B.A.P. 9th Cir. 1989), holding that  
3 prepayment premiums are available after a bankruptcy-induced acceleration, *id.* at 999–1000; *see*  
4 *also In re 433 S. Beverly Drive*, 117 B.R. 563, 565 (Bankr. C.D. Cal. 1990) (same), and with  
5 California state court decisions, holding that prepayments may follow acceleration generally.<sup>9</sup> The  
6 Debtors, who do not even cite *Imperial Coronado*, ignore Ninth Circuit authority on this issue.

7 Instead, the Debtors highlight cases cited in the Second Circuit’s *Momentive* decision,  
8 *Matter of MPM Silicones, L.L.C.* (“*Momentive*”), 874 F.3d 787 (2d Cir. 2017), that they contend  
9 establish that make-wholes are not available after a bankruptcy-induced acceleration. Debtors’ Br.  
10 at 8. As described in the Creditors’ Brief, the *Momentive* decision is factually distinguishable with  
11 respect to the majority of the Senior Notes, *see* Creditors’ Br. at 24, precluded by the “Intentional  
12 Evasion” doctrine, *id.* at 25–26, and wrongly decided, *id.* at 26. The cases that the *Momentive* court  
13 relied upon—and the additional cases the Debtors cite —found only that *prepayment* premiums  
14 were foreclosed following maturity.<sup>10</sup> *See In re Solutia Inc.*, 379 B.R. 473, 488 (Bankr. S.D.N.Y.  
15 2007) (“Prepayment can only occur *prior* to the maturity date”); *In re AMR Corp.*, 730 F.3d 88,  
16 103 (2d Cir. 2013) (same); *Tan v. Cal. Fed. Sav. & Loan Ass’n*, 189 Cal. Rptr. 775, 781–82 (Ct.  
17 App. 1983) (addressing prepayment penalties following acceleration).<sup>11</sup> The *EFH* court recognized  
18 the importance of the distinction between a prepayment and redemption: “Once a maturity date is  
19 accelerated to the present, it is no longer possible to *prepay* the debt before maturity.” *EFH*, 842  
20

---

21 <sup>9</sup> *See Golden Forest Props., Inc. v. Columbia Sav. & Loan Assn.*, 248 Cal. Rptr. 316, 318 (Ct. App. 1988); *Pac. Tr. Co.*  
22 *TTEE v. Fid. Fed. Sav. & Loan Assn.*, 229 Cal. Rptr. 269, 274 (Ct. App. 1986); *Ridgley v. Topa Thrift & Loan Ass’n*,  
953 P.2d 484, 489–90 & n.3 (Cal. 1998); *Biancalana v. Fleming*, 53 Cal. Rptr. 2d 47, 49–50 (Ct. App. 1996).

23 <sup>10</sup> *Momentive* is also factually distinguishable because in that case, the debtors treated noteholder claims with the  
24 issuance of replacement notes to the existing noteholders, not by payment of cash proceeds raised by a refinancing  
intended to save interest expense. Here, the Debtors are proposing to treat the Senior Note claims through the payment  
25 of cash, which is undoubtedly a redemption within the meaning of the Note Documents. *Momentive* also relies on  
*AMR*, a Second Circuit decision where the relevant indentures explicitly forbade payment of the redemption premium  
following a bankruptcy filing. *Momentive*, 874 F.3d at 802–03.

26 <sup>11</sup> Of course, the Ninth Circuit has held that even prepayment clauses can be redeemed following bankruptcy, *see supra*  
27 at 9. The *Tan* court, applying California law, did not defy the weight of authority in California on this issue by finding  
prepayments are foreclosed as a matter of law following maturity; rather, it held that the specific language in the  
28 prepayment premium provision made it clear that the prepayment penalty was only available upon the borrower’s  
decision to prepay the debt. 189 Cal. Rptr. at 781–82.

1 F.3d at 260. By contrast, a “redemption” can even occur, under common understanding,  
2 simultaneously with maturity, *id.* at 259 (quoting *Chesapeake Energy Corp. v. Bank of N.Y. Mellon*  
3 *Tr. Co., N.A.*, 773 F.3d 110, 116 (2d Cir. 2014)), or after under the provision’s terms, *id.* at 257–  
4 58. The same logic that applies to “pre-” payments does not apply to redemptions. *EFH*, 842 F.3d  
5 at 260. The fact that the Third Circuit decided *EFH* while the Second Circuit decided *Momentive*  
6 (see Debtors’ Br. at 8) is of no moment: both Circuits interpreted and applied New York Law. The  
7 Debtors’ reliance on *Momentive* is thus unavailing.

8 **2. Section 9.02 and the Optional Redemption Provisions Function**  
9 **Independently.**

10 The Debtors argue that § 9.02 *implicitly* disclaims payment of the Optional Redemption  
11 Premiums following bankruptcy by providing that (a) principal, accrued interest, and “premiums,  
12 if any” are due following non-bankruptcy acceleration, but (b) only “the principal amount” is due  
13 and owing following a bankruptcy-induced acceleration. Indentures § 9.02; see Debtors’ Br. at 4,  
14 11. The absence of the “premium, if any” language from the acceleration clause lacks the import  
15 the Debtors attempt to assign to it. To the contrary, it sensibly allows for the possibility that  
16 Optional Redemption Premiums may or may not be due following bankruptcy, depending on the  
17 Utility’s choices.

18 The omission of a reference to any “premium” concerning certain bankruptcy-related events  
19 of default simply recognizes a critical distinction between bankruptcy and non-bankruptcy defaults.  
20 When the debt is accelerated by other Events of Default outside of bankruptcy, it necessarily  
21 follows that the Utility would have no option to reinstate the Senior Notes, making any Optional  
22 Redemption Premiums due immediately.<sup>12</sup>

23 The same is not true following a bankruptcy filing, since the Bankruptcy Code permits the  
24 Debtors to elect to satisfy *or* reinstate the Senior Notes. If the Senior Notes are reinstated, the  
25 obligations under the Senior Notes are due on their original terms. But if the Senior Notes are not  
26 reinstated but instead repaid, the Optional Redemption Provisions require payment of the Option

---

27 <sup>12</sup> The Debtors’ position that Optional Redemption Premiums are never due after “Maturity,” moreover, would render  
28 meaningless the “premium if any” language in section 9.02. Once a debt is accelerated, Maturity occurs, and no  
“premiums” could ever be due, according to the Debtors.



1 Redemption Premium. The fact that the Debtors have a choice readily explains why section 9.02  
2 does not specify what occurs with respect to a “premium” in the event of a bankruptcy filing. On  
3 top of that, the omission of “premiums” from the section 9.02 is immaterial given the Noteholders’  
4 ability to file a proof of claim including the Optional Redemption Premiums in the bankruptcy.

5 Notably, the Debtors’ interpretation of the acceleration clause would conflict directly with  
6 other provisions of the Note Documents that allow for post-bankruptcy collection of Optional  
7 Redemption Premiums. In particular, section 9.05 permits the Indenture Trustee to include  
8 “premium, if any” among the amounts asserted in bankruptcy proofs of claim. The Indentures also  
9 state that “notwithstanding any other provision in [the] Indenture, the Holder of any Bond shall  
10 have the right, which is absolute and unconditional, to receive payment of . . . premium, if any.”  
11 *E.g.*, 2018 Indenture Art. IX § 9.08 (“Unconditional Right of Holders to Receive Principal,  
12 Premium, and Interest”) (August 6, 2018) (emphasis added). Those provisions would be rendered  
13 meaningless under the Debtors’ interpretation of section 9.02. *See EFH*, 842 F.3d at 257 (court  
14 must afford all provisions in contract full effect); *Balsam v. Tucows Inc.*, 627 F.3d 1158, 1162 (9th  
15 Cir. 2010) (same).

16 Section 9.02’s silence with respect to “premiums” following a bankruptcy means simply  
17 that the Optional Redemption Premiums are not triggered automatically upon a bankruptcy filing.  
18 No language in the acceleration clause precludes Optional Redemption Premiums after bankruptcy;  
19 to the contrary, other sections of the Note Documents expressly permit it. The Debtors’  
20 interpretation does not withstand examination of the Note Documents as a whole.

21 Further, section 9.02 does not mention the Optional Redemption Provisions—it addresses  
22 acceleration. *See* Indentures § 9.02. “The two sections simply address different things: § [9.02]  
23 causes the maturity of [the Utility’s] debt to accelerate on its bankruptcy, and [the Optional  
24 Redemption Provisions] cause[] a make-whole to become due when there is an optional redemption  
25 before [a date fixed in Note Documents].” *EFH*, 842 F.3d at 256. These provisions exist in  
26 harmony. *See id.* There is no reason to read the acceleration clauses to render other provisions of  
27 the contract null and void in the event of a bankruptcy. *See id.*; *see also NML Capital v. Republic*  
28 *of Arg.*, 952 N.E.2d 482, 487 (N.Y. Ct. App. 2011) (there is no rule that “terms of a contract not

1 necessarily impacted by acceleration . . . automatically cease to be enforceable after acceleration.”);  
2 Creditors’ Br. at 20–23. That is especially true for the Optional Redemption Provisions applicable  
3 to the Any Time Notes and Fixed Date Notes, given that they say nothing about Maturity and thus  
4 are not impacted by acceleration. *See EFH*, 842 F.3d at 256–57 (“It surpasses strange to hold that  
5 silence in [the acceleration clause] supersedes [the optional redemption clause’s] simple script.”).

6 The Debtors nowhere discuss the holdings of *EFH*, *NML Capital*, and other cases that say  
7 that an acceleration clause, otherwise silent with respect to the availability of make-whole  
8 premiums, does not negate the holders’ entitlement to make-wholes after a bankruptcy-induced  
9 acceleration. *See In re Chemtura Corp.*, 439 B.R. 561, 601, 603 (Bankr S.D.N.Y 2010) (bankruptcy  
10 acceleration did not negate make-whole provision tied to a fixed maturity date); *In re Premier*  
11 *Entm’t Biloxi LLC*, 445 B.R. at 631. (“[A]ccelertaion will not defeat the right to a prepayment  
12 premium.”) (citing *In re LHD Realty Corp.*, 726 F.2d 327, 332 (7th Cir. 1984)). Instead, they rely  
13 on *AMR* to argue that the acceleration clause forecloses Optional Redemption Premiums. Debtors’  
14 Br. at 11.

15 The clause at issue in *AMR*, however, unlike section 9.02, explicitly disclaimed make-whole  
16 premiums after a bankruptcy-induced acceleration. *In re AMR Corp.*, 730 F.3d at 99 (acceleration  
17 provision stated that principal and interest, “but for the avoidance of doubt, without Make-Whole  
18 Amount” would be due following bankruptcy-induced acceleration). Reading section 9.02’s  
19 silence with respect to Optional Redemption Premiums to foreclose their availability following  
20 bankruptcy defies the rules of contract construction, to “giv[e] effect to the intent of the parties as  
21 revealed by the language in their agreement[s].” *Chesapeake Energy Corp.*, 773 F.3d at 113–14.<sup>13</sup>

### 22 C. The Debtors’ Redemption of the Senior Notes Is Optional.

23 The Debtors’ decision to satisfy the Senior Notes prior to the dates specified in the Note  
24 Documents is entirely “optional,” even when made after their bankruptcy filing. *See Imperial*  
25 *Coronado*, 96 B.R. 999–1000; *EFH*, 842 F.3d at 255. The Debtors elected to file for protection  
26 under chapter 11. The Debtors have the ability to reinstate the Senior Notes and leave their

---

27 <sup>13</sup> The *EFH* court held that the “rule of explicitness” sometimes applicable to prepayment premiums does not apply in  
28 the context of an optional redemption clause because the term “prepayment” is indicative of a pre-maturity payment of  
debt. *EFH*, 842 F.3d at 259.

1 obligations thereunder intact after the Debtor Plan's proposed effective date. Section 1124 provides  
2 that "notwithstanding any contractual provision or applicable law" entitling holders of a claim in  
3 bankruptcy to "demand or receive accelerated payment" of their claims, the debtors can "reinstate  
4 the maturity [of debt] as such maturity existed before such default." 11 U.S.C. § 1124(2)(B).  
5 Therefore, to the extent that the Debtors choose not to reinstate the Senior Notes, the redemption  
6 of the Senior Notes on the effective date is clearly "optional." *See Imperial Coronado*, 96 B.R. at  
7 999–1000 (debtor "had the right to deaccelerate the due date of the loan as part of a plan of  
8 reorganization . . . [under] 11 U.S.C. § 1124(2)," so its decision to pay it off rather than reinstate it  
9 was "voluntary"); *EFH*, 842 F.3d at 255 (same); *see also* Creditors' Br. at 12–15.

10 Once again, the Debtors embrace an argument to the contrary that would require the Court  
11 to gloss over important nuances. The Debtors' argument that "after maturity, the Utility is obligated  
12 to repay all of the debt under the terms of the Indentures [so] payment is no longer optional," *see*  
13 Debtors' Br. at 8, ignores the reinstatement option available to the Debtors under Bankruptcy Code  
14 section 1124. Their decision to pay off the Senior Notes is optional, as *Imperial Coronado* and  
15 *EFH* held.

16 Accordingly, any attempt by the Debtors to satisfy the Senior Notes prior to the dates  
17 specified in the Note Documents constitutes a "redemption" that is "optional," entitling  
18 Noteholders to Optional Redemption Premiums under the terms of the Note Documents.

## 19 **II. The Optional Redemption Premiums Are Not Disallowed By The Bankruptcy Code.**

### 20 **A. Optional Redemption Premiums Are Not Unmatured Interest.**

21 The vast majority of courts nationwide—including the *Imperial Coronado* court within the  
22 Ninth Circuit—have found that make-whole premium claims are not unmatured interest disallowed  
23 under section 502(b)(2) of the Bankruptcy Code. *See* Creditors' Br. at 27–28 (collecting cases);  
24 *see also In re Trico Marine Servs., Inc.*, 450 B.R. 474, 480 (Bankr. D. Del. 2011) ("[T]he substantial  
25 majority of courts considering the issue have concluded that make-whole or prepayment obligations  
26 are in the nature of liquidated damages rather than unmatured interest, whereas courts taking a  
27 contrary approach are in the distinct minority."). Rather, make-whole premium claims are treated  
28 as liquidated damages or charges. Creditors' Br. at 27–28. Notwithstanding the Debtors' citation

1 to *In re Ridgewood Apartments of DeKalb Cty., Ltd.*, 174 B.R. 712, 720 (Bankr. S.D. Ohio 1994)  
2 (cited in Debtors' Br. at 13, 14, 15), that is the better view. And the Fifth Circuit's recent about-  
3 face in *Ultra Petroleum Corp. v. Ad Hoc Comm. of Unsecured Creditors of Ultra Res., Inc. (In re*  
4 *Ultra Petroleum Corp.)*, No. 17-20793, 2019 WL 6318074 (5th Cir. Nov. 26, 2019), in which the  
5 panel vacated a prior decision that characterized prepayment premiums as unmatured interest,  
6 demonstrates the dubious grounding of the Debtors' position. *See id.* at \*1, \*5–6.

7 The debtors argue that the Optional Redemption Premiums are the economic equivalent of  
8 interest. That point is immaterial. As noted, the Optional Redemption Premiums are charges—  
9 akin to liquidated damages—intended to compensate the Noteholders' for their economic losses in  
10 the event of an early redemption of the Senior Notes. *See Creditors' Br.* at 27–28. Liquidated  
11 damages are legally required to mimic the contracting party's economic losses; otherwise, they are  
12 unenforceable penalties. *See, e.g., G3-Purves St., LLC v. Thomson Purves, LLC*, 953 N.Y.S.2d  
13 109, 113 (2012) (liquidated damages provisions must affix an amount that “reasonabl[y] measure[s]  
14 . . . the probably actual loss in the event of a breach” (quotation omitted)). The Optional  
15 Redemption Premium must therefore resemble the Noteholders' actual economic losses to be  
16 enforceable contract provisions. That this figure mimics an interest calculation is both unsurprising  
17 (to be enforceable at all, it must), and legally immaterial under the majority of cases finding such  
18 calculations to be enforceable in bankruptcy.

19 The remaining cases upon which the Debtors rely either (1) do not address the unmatured  
20 interest question,<sup>14</sup> or (2) evaluate whether a make-whole is akin to unmatured interest on a case-  
21 by-case basis.<sup>15</sup> Thus, even if this Court were to deviate from Ninth Circuit precedent and the  
22 overwhelming weight of authority, it would be required to conduct a factual analysis of the Optional  
23 Redemption Premiums to determine whether they are designed to compensate for unmatured  
24 interest in the context of the “dynamics of the individual case.” *In re Ultra Petroleum Corp.*, 2019

25 \_\_\_\_\_  
26 <sup>14</sup> *HSBC Bank USA, Nat. Ass'n v. Calpine Corp.*, No. 07 CIV 3088 GBD, 2010 WL 3835200, at \*5 (S.D.N.Y. Sept.  
27 15, 2010) (court did not find that the prepayment premium was disallowed by 502(b)(2) as unmatured interest; the  
28 prepayment premiums were not triggered because the premium was only owed if the notes were repaid on or after April  
1, 2007 and 2008, the Notes were repaid on March 29, 2007); *In Re LHD Realty Corp.*, 726 F.3d at 330 (discussing  
purpose of make-whole premiums)..

<sup>15</sup> *In re Doctors Hosp. of Hyde Park, Inc.*, 508 B.R. 697, 701–02 (Bankr. N.D. Ill. 2014).

1 WL 6318074 at \*5 (espousing no position on whether make-wholes constitute unmatured interest  
2 and remanding for the bankruptcy court to determine this question in the first instance). The record  
3 is not ripe for such a review, and further discovery on this point would be necessary.

4 In addition, even if the Optional Redemption Premiums were “interest” (and they are not),  
5 such interest would not be “unmatured” because the Optional Redemption Premiums are grounded  
6 in prepetition contracts that would become due by reason of repayment of debt under a plan. *See*  
7 *In re 360 Inns, Ltd.*, 76 B.R. 573, 576 (Bankr. N.D. Tex. 1987) (“prepayment penalty was not  
8 unmatured interest as contemplated in § 502(b)(2), inasmuch as the prepayment penalty was  
9 activated and matured once the plan of reorganization proposed to prepay UNUM’s debt”); *In re*  
10 *Outdoor Sports Headquarters, Inc.*, 161 B.R. 414, 424 (S.D. Ohio 1993) (“Prepayment amounts .  
11 . . do not constitute unmatured interest because they fully mature pursuant to the provisions of the  
12 contract.”); *see also* Creditors’ Br. at 27–28. The Debtors attempt to conflate “interest” with  
13 “premium” by relying on *Thrifty Oil Co. v. Bank of Am. Nat’l Tr. and Savs. Ass’n*, 322 F.3d 1039,  
14 1047 (9th Cir. 2003). Debtors’ Br. at 14. *Thrifty Oil* is not only factually inapplicable—the court  
15 there examined whether damages due upon termination of a swap agreement constituted  
16 “interest”—but it also found that such damages “merely provide[d] the replacement cost of the lost  
17 swap payments and [did not] represent interest, unmatured or otherwise.” *Thrifty Oil Co.*, 322 F.3d  
18 at 1048.

19 Thus, no provision of the Bankruptcy Code disallows the Optional Redemption Premiums.  
20 The Debtors must therefore (1) pay the Optional Redemption Premiums under the terms of the Note  
21 Documents if they elect to satisfy the Senior Notes, or (2) treat the Noteholders’ claims as impaired.

22 **B. The Debtors’ Solvency Underscores Their Obligation to Fulfill Contractual**  
23 **Commitments.**

24 Finally, even if the Court rules that the Optional Redemption Premiums are unmatured  
25 interest (they are not), the presumed-solvent Debtors must still pay Optional Redemption Premiums  
26 as required under the Note Documents. *See* Creditors’ Br. at 29–30. This presumption that  
27 creditors are entitled to the full benefit of their prepetition bargain—even including amounts that  
28 are disallowed by the Bankruptcy Code—is widely recognized because it is generally the “opposite

1 of equity to allow the debtor to escape the expressly-bargained-for result of its act.” Creditors’ Br.  
2 at 29 (quoting *Ruskin v. Griffiths*, 269 F.2d 827, 832 (2d Cir. 1959)).

3 Contrary to the Debtors’ position, this solvent debtor-exception is not a “relic of the past.”  
4 Debtors’ Br. at 15. True, the concept pre-dates the Bankruptcy Code. But cases that post-date the  
5 enactment of the Bankruptcy Code continue to hold that creditors are entitled to the full benefit of  
6 their prepetition bargain in solvent debtor cases, as equitable considerations for the allocation of  
7 the debtors’ “limited pie” give way to “the presumption . . . that a bankruptcy court’s role is merely  
8 to enforce the contractual rights of parties.” *In re Dow Corning*, 456 F.3d 668, 678–79 (6th Cir.  
9 2006); *see also Gencarelli v. UPS Capital Bus. Credit*, 501 F.3d 1 (1st Cir. 2007) (“This is a solvent  
10 debtor case and, as such, the equities strongly favor holding the debtor to his contractual obligations  
11 as long as those obligations are legally enforceable under applicable non-bankruptcy law”);  
12 Creditors’ Br. at 29–31 (collecting cases).

13 Just last month the Fifth Circuit joined the uninterrupted line of case law preserving the  
14 solvent debtor exception in *In re Ultra Petroleum Corp.* when it went out of its way to note that its  
15 “review of the record reveals no reason why the solvent-debtor exception could not apply” and  
16 expressly instructed the bankruptcy court, on remand, to “consider . . . the applicability of the  
17 solvent-debtor exception.” *Id.* at \*6. Conducting that analysis harmonized with “other circuits  
18 hav[ing] recognized” that, “absent compelling equitable considerations, when a debtor is solvent,  
19 it is the role of the bankruptcy court to enforce the creditor’s contractual rights.” *Id.* (quoting *In re*  
20 *Dow Corning*, 456 F.3d at 679) (citing *In re Chi., Milwaukee, St. Paul & Pac. R. R. Co.*, 791 F.2d  
21 524, 528 (7th Cir. 1986)). These cases are consistent with existing Ninth Circuit precedents that  
22 pre- and post-date the Bankruptcy Code. *See, e.g., Gen. Elec. Capital Corp. v. Future Media*  
23 *Prods.*, 547 F.3d 956 (9th Cir. 2008); *In re Beverly Hills Bancorp*, 752 F.2d 1334, 1339 (9th Cir.  
24 1984) ; *Epicenter Partners, L.L.C. v. CPF Vaseo Ass’n (In re Epicenter Partners, L.L.C., No. 17-*  
25 *1216, 2018 WL 1354330, at \* 7 (B.A.P. 9th Cir. Mar. 15, 2018).* Indeed, Courts within the Ninth  
26 Circuit continue to apply the solvent-debtor exception in the post-Code era, *e.g., In re Sidrian*, No.  
27 08-42959 T, 2009 WL 3627932 (Bankr. N.D. Cal. Feb. 25, 2009) (ECF No. 169), and there is no  
28 basis to stray from this firmly entrenched principle of bankruptcy law.

1 To the contrary, courts have recognized that the solvent-debtor exception is now embedded  
2 in the provisions of the Bankruptcy Code. For example, the Sixth Circuit has explained that the  
3 solvent debtor exception is bound with the fair and equitable test under § 1129(b) and the absolute  
4 priority rule: equity cannot be paid in bankruptcy before impaired classes of creditors are paid in  
5 full if the debtor is solvent. *In re Dow Corning*, 456 F.3d at 678–79. Moreover, under section  
6 1124, creditors are only “unimpaired” and thus precluded from voting if their legal, equitable, or  
7 contractual rights are left unaltered in any way by operation of the plan. In *In re Energy Future*  
8 *Holdings Corp.*, 540 B.R. 109, 120 (Bankr. D. Del. 2015), the bankruptcy court held that,  
9 notwithstanding section 502(b), in order for a solvent debtor to leave a creditor unimpaired, the  
10 plan must preserve the creditor’s equitable right to certain interest, effectively importing the “fair  
11 and equitable test” of section 1129(b) into section 1124(1). *Id.* at 120. A recent Ninth Circuit case  
12 applying the identical “rights” language of section 1124(2) holds that “one of those rights is post-  
13 default interest.” *Pacifica L 51 LLC v. New Invs., Inc. (In re New Invs., Inc.)*, 840 F.3d 1137, 1142  
14 (9th Cir. 2016). The solvent debtor exception is therefore embedded in concepts written in the  
15 Bankruptcy Code. Moreover, the date the interest might become due (whether pre or post-effective  
16 date) is irrelevant because payment of the Optional Redemption Premium is due as of the Effective  
17 Date. Therefore contrary to the Debtors’ assertion, such payments are captured by the solvent  
18 debtor exception.

19 Because the Debtors are solvent, they are obligated to pay Optional Redemption Premiums  
20 by virtue of their solvency and the plain language of the Note Documents *even if* such premiums  
21 are deemed to be “unmatured interest.” *See EFH*, 842 F.3d at 255; *see Creditors’ Br.* at 29–30  
22 (collecting cases).

### 23 CONCLUSION

24 The Debtors offer a strained interpretation of the Note Documents and applicable state  
25 law, and rely upon minority decisions directly contradicted by precedent in the Ninth Circuit and  
26 courts around the country to deprive the Noteholders of their valuable rights: either (1) the amount  
27 they are owed by virtue of the Optional Redemption Provisions, or (2) the right to vote to accept  
28 or reject the Debtor Plan as impaired creditors. The Debtors’ position is contradicted by the Note



1 Documents' plain language and applicable precedent.

2 Accordingly, BOKF and the AHC respectfully request that this Court enter an order  
3 declaring that (i) the Noteholders are entitled to a claim for the Optional Redemption Premiums  
4 if the Senior Notes are paid or satisfied, and (ii) should any plan proponent propose to satisfy  
5 principal and interest due on the Senior Notes without paying the Noteholders the Optional  
6 Redemption Premiums, the Noteholders will be impaired and entitled to vote to accept or reject  
7 any plan incorporating such a proposal.

8  
9  
10  
11 Dated: December 20, 2019

**ARENT FOX LLP**

12  
13 By: /s/ Aram Ordubegian  
14 ARAM ORDUBEGIAN (SBN 185142)  
ANDREW I. SILFEN (*pro hac vice*)  
BETH M. BROWNSTEIN (*pro hac vice*)

15 *Counsel for BOKF, NA, solely in its capacity as*  
16 *Indenture Trustee for the Utility Senior Notes*

**AKIN GUMP STRAUSS HAUER & FELD LLP**

17  
18 /s/ Ashley Vinson Crawford  
ASHLEY VINSON CRAWFORD  
19 MICHAEL S. STAMER  
IRA S. DIZENGOFF  
20 DAVID H. BOTTER  
ABID QURESHI

21 *Counsel for the Ad Hoc Committee of Senior*  
22 *Unsecured Noteholders of Pacific Gas and Electric*  
23 *Company*

**MILBANK LLP**

24  
25 /s/ Thomas R. Kreller  
DENNIS F. DUNNE  
26 SAMUEL A. KHALIL  
GREGORY A. BRAY  
27 THOMAS R. KRELLER

28 *Counsel for the Official Committee of Unsecured*  
*Creditors*